

TESTIMONY OF K. JEROME GOTTSCHALK
ON BEHALF OF
THE LITTLE SHELL TRIBE OF CHIPPEWA
INDIANS OF MONTANA

SENATE COMMITTEE ON INDIAN AFFAIRS
HEARING ON S. 546
THE LITTLE SHELL TRIBE OF CHIPPEWA INDIANS RESORATION
ACT OF 2011

April 14, 2011

Chairman Akaka, Vice Chairman Barrasso, Senator Tester, and honorable members of this Committee on Indian Affairs, on behalf of the Little Shell Tribe of Montana, I thank you for the opportunity to testify before this Committee today in order to provide some perspective on the long, expensive, and frustrating process experienced by the Little Shell Tribe in attempting to comply with the administrative requirements for federal acknowledgment. I am an attorney at the Native American Rights Fund and we have assisted the Tribe in its efforts to achieve recognition for more than twenty years. NARF's out of pocket expenses for consultant work have exceeded one million dollars and we have devoted four thousand hours of attorney time to this effort.

The Little Shell Tribe first sent a letter to the Bureau of Indian Affairs petitioning for federal acknowledgment in 1978. This petition was transferred to the administrative process of Federal acknowledgment which became effective on October, 2, 1978. The BIA received an initial partially documented petition in December of 1982 and issued an obvious deficiency letter in January of 1983. The Tribe submitted additional materials in 1983 and a revised documented petition in September of 1984. In April of 1985, the BIA sent a second, more detailed, technical assistance letter. The Tribe responded to this letter in November of 1987 and submitted additional materials in 1989. Subsequently, the Tribe, through NARF, hired new researchers who did more research and submitted more materials. The BIA determined that the petition was ready for active consideration on March, 23, 1995 but it was not put on active consideration until February, 1997, nearly two years later. Notwithstanding that the regulations provide in Section 83.10 (h) that proposed findings are to be issued within one year after notification that a petition has been put on active consideration, or February of 1998 in the case of Little Shell, the proposed findings (PF) were not issued until July 14, 2000, or nearly one and one half years beyond the prescribed time.

The PF was in favor of recognition and indicated that it departed from prior decisions in regard to four criteria, noting that prior precedent is not binding and that "...such departures from previous practice on these matters are permissible and within the scope of the existing acknowledgment regulations." 65 Fed. Reg. 45394, 45395 (July 21, 2000). The proposed finding explained the rationale behind the departures from precedent. As to criterion a) which requires identification as an Indian entity on a

substantially continuous basis since 1900, the Assistant Secretary accepted as a “reasonable likelihood that references to the petitioner’s individual ancestors as residents of Indian settlements before the 1930’s are consistent with the identification of these and other ancestors of the petitioner as Indian groups after 1935.” The Assistant Secretary stated, “The Department believes that, absent strong proof to the contrary, it is fair to infer a continuity of identification from the evidence presented, particularly in light of the fact that an absence of formal organization can be attributed to the United States’ pursuit of a discredited policy of treating ‘full-blooded’ Indians differently from those of mixed white and Indian ancestry...[T]o rigidly impose a mechanistic burden of proof on a people whose lack of formal organization is attributable to misguided Federal policy would be manifestly unjust and inconsistent with the regulations.” Summary under the Criteria for the Proposed Finding for Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana, (July 14, 2000) at pp. 6-7.

As to criteria b) community and c) political influence the Assistant Secretary accepted “...as a reasonable likelihood that patterns of social relationships and political influence among the Metis residents of settlements in North Dakota and Canada during the mid-19th century persisted among their descendants who migrated to Montana...Based on the entirety of the record, especially the history of the United States’ dealings with the ancestors of the petitioner, the strong evidence of continuous internal social interaction, the consistent existence of the petitioner’s ancestors as distinct social and cultural communities, and the understandable difficulty in completing research on a very large number of dispossessed Indians on the American frontier, the Department proposes to find that the criteria (b) and (c) are met in this case.” *Id.* at p. 6.

Finally, as to criterion e) descent from a historic Tribe, based on the additional work done by the Tribe’s researchers, the final determination acknowledges that at least 89% of the Tribe’s members trace from the historic Pembina Band of Chippewa and that this criterion is met without any need for a departure from precedent. 74 Fed. Reg. 56861, 56865-6 (November 3, 2009).

The PF invited “... on these various matters, including the consistency of these proposed findings with the existing regulations.” 65 Fed. Reg. 45394, 45395 (July 21, 2000). There were only two comments received during the comment period. In its final determination (FD), the OFA acknowledged that one of the comments was rendered moot by additional materials that the Tribe submitted, and that the second commenter offered no new documentation or citations to support her claims. Summary under the Criteria and Evidence for Final Determination Against the Federal Acknowledgment of the Little Shell Tribe of Chippewa Indians of Montana, October 27, 2009 at pp. 16-17. Thus, the PF was in favor of recognition, there was no new evidence against recognition, and “no direct comments on the issue of the PF’s departure from precedent other than to ask ‘why’ such departures had occurred and request an explanation.”

At this point, one wonders how the FD could overturn the PF, when no evidence against the PF was submitted during the comment period. The apparent answer is contained in the October, 27, 2009 summary in support of the FD which states that “The PF invited public comment from the petitioner and third parties on these ‘departures from previous practice’ and on the ‘consistency’ of the PF ‘with the existing regulations.’ It stated that such ‘supplementary evidence’ could create ‘a different record and a more complete factual basis for the final determination,’ and ‘eliminate or reduce the scope of these *contemplated* departures from precedent’ (65 FR 45395; Little Shell PF 200, Summary, 7; emphasis added). The emphasis added is by the Assistant Secretary in the FD. The apparent purpose is to suggest that the departures from precedent were always up for grabs.

This is disingenuous in two regards. First, the PF acknowledged that “This proposed finding is based on the available evidence, and, as such, does not preclude the submission of other evidence during the 180-day comment period....Such new evidence may result in a modification or reversal of the conclusions reached in the proposed finding.” PF at 6. Thus, if negative evidence or comments were received, it might modify the conclusions. But no such evidence or comments were received. Second, the Tribe was encouraged to submit supplementary evidence and “Such supplementary evidence may create a different record and a more complete factual basis for the final determination, and thus eliminate or reduce the scope of these contemplated departures from precedent.” Id. at 7. This is precisely what happened in regard to criterion e) descent from an historic tribe where the FD acknowledges that this criterion is met without the need for any departure from precedent.

The Tribe continued working in the good faith belief that it had met its burden, because the PF said that it had. It worked to ensure that it could respond to any negative evidence which might be presented – none was – and to help eliminate or reduce the scope of any departures from precedent – which it did as to criterion e). No reasonable interpretation of the word “contemplated” as used in the PF would include the possibility that without contrary evidence or persuasive argument, the Bureau might change its mind on a whim. And yet that is what happened. Is it any wonder that the Tribe is frustrated?

The administrative process clearly has not served the Little Shell Tribe and is not designed for Tribes such as Little Shell. It puts the Tribe to a virtually impossible standard of evidence. Criterion a) requires that outsiders identify petitioners not just as Indian individuals, but as an Indian entity. Essentially, this criterion requires interaction between outsiders and the tribal community sufficient to produce a document identifying the tribal community every ten years. The FD recognizes that there were many references from 1900 to 1935 to landless Indians, breeds and other uncomplimentary names. But it says that there were not references to Indian entities. The misfit of the criterion to Little Shell is breathtaking. Historically, the Little Shell was a migratory band, following the buffalo herds between the United States and Canada. By the early 1880’s, most of the herds had disappeared and Little Shell ancestors began to settle in out of the way, rural places in Montana. Even then, Little Shell ancestors avoided contact with the dominant society because that contact subjected them to open and blatant

discrimination. Thus, Little Shell survived as a migratory people off the official radar screen. By its nature, this life style does not produce the paper trail required by criterion a.

As to criteria b (community) and c (political influence), the BIA requires proof of relationships – in the case of community, relationships among the tribal members, and in the case of political influence, relationships between the tribal members and their political leaders. Again, self-identification of leaders and oral tradition are not sufficient for a tribe to carry its burden of proof. There must be documentary evidence, or alternatively statistics (e.g., on marriage rates) from which the BIA is willing to presume the existence of interaction. Obviously, such documents are not likely to exist for a tribal community that survived historically in the traditional way and in modern times by avoiding dominant society. Combine this with the economic, social and political dislocation suffered by the Little Shell, as the BIA itself found, it becomes clear that Little Shell presents a unique circumstance in which a paper driven process simply will not work. As a result, failure by Little Shell on these criteria in the final determination does not mean that it does not exist as a tribe; it only means that the administrative process is simply not well suited to judge the unique history and circumstances of Little Shell. As the Assistant Secretary noted in the Proposed Finding on Little Shell, the administrative process must be applied in a flexible manner, giving different weight to various kinds of evidence, to accommodate the unusual history of Little Shell. 65 Fed. Reg. No. 141, at 45395 (July 21, 2000) (“...the evidence as a whole indicates that the Little Shell petitioner is a tribe.”). Ultimately, though, the BIA found that the process did *not* allow for this flexibility and there was insufficient evidence of these three criteria for Little Shell.

The Little Shell is an admitted Indian people, as the finding as to criterion e) demonstrates conclusively. However, because the regulations require documentation of detailed, nuanced issues over a long period of time, Little Shell was declined. Clearly, this is a failure of the administrative process as applied to Little Shell, not a failure on the part of Little Shell to exist as an Indian tribe. The appropriateness of legislation under these circumstances was noted even by the professional staff at the BIA, the same personnel who ultimately recommended that Little Shell be declined for federal acknowledgment. Writing in 2000, the chief of the Office of Federal Acknowledgement effectively admitted the unsuitability of the process for Little Shell. He noted the departure of the proposed Little Shell finding from past precedent and suggested that special legislation should be considered: “Another alternative would be to recommend legislation to acknowledge this petitioner. This recommendation would be based on a finding that because of the unique and complicated nature of its history, this petitioner is outside the scope envisioned by the regulations, but nonetheless merits tribal status.” Memorandum from Chief, Branch of Federal Acknowledgment and Research, to Acting Deputy Commissioner, on Proposed Finding on the Petition of the Little Shell Tribe of Chippewa Indians, May 5, 2000 (Attachment A). This is precisely why S. 546 should be enacted by Congress.

The FD has not become effective yet because of an appeal filed with the Interior Board of Indian Appeals. That body may take years to rule. Its scope of review is limited and to my knowledge no tribe has ever improved its position on appeal. The best that has ever been done is to have a favorable decision affirmed.

Only Congress can now establish the government to government relationship with the Tribe to which its status entitles it. The Department knows that the Little Shell deserve recognition, as shown by its references to Departmental action in the 1930s and Congressional action in 1982 that support Congressional recognition now.



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240



IN REPLY REFER TO:

MAY 5 2000

Tribal Services - AR

Memorandum

To: Acting Deputy Commissioner

Through: Director, Office of Tribal Services

From: Chief, Branch of Acknowledgment and Research

Subject: Proposed Finding on the Petition of the Little Shell Tribe of Chippewa Indians

Attached is a draft proposed finding to acknowledge the Little Shell petitioner, based on the language of your e-mail message of April 14, 2000 (copy attached). The regulations require the Assistant Secretary to "prepare a report summarizing the evidence, reasoning, and analyses that are the basis for the proposed decision" (§83.10(h)). You extended the period for the Little Shell proposed finding until May 12, 2000, to allow preparation of such a decision document.

In drafting the finding, we have been unable to expand the rationale of the decision beyond that given in the e-mail. Consequently, we have described in this memo where additional guidance is needed on the evidence, reasoning and analyses you used in concluding the regulations are met.

We are concerned that the e-mail text does not give a specific explanation why the petitioner meets each of the seven mandatory criteria, as past decisions have done. In addition, the e-mail text does not note that this decision departs significantly from past precedent on several of the criteria. We believe that the decision should identify these changes and provide a rationale for the changes. Finally, we are concerned that the language of the e-mail appears to base acknowledgment of tribal sovereignty upon descent from a tribe without a showing of the maintenance of continuous tribal existence as a political community. Such a decision is inconsistent with the regulations. We believe these issues, which are outlined in greater detail below, should be addressed in order to develop a defensible decision.

There are several alternative approaches which could be adopted in lieu of issuing a positive proposed finding in order to meet your objectives. We request that you consider these options, which are outlined in the final section of this memo.

ISSUES WHICH NEED CLARIFICATION

The text of your e-mail focuses on evidence of descent, stating that you considered descent from a treaty tribe to be "compelling," despite "evidentiary gaps." Such evidence is required by criterion (e), but evidence other than descent is required by the other six criteria. We need a more detailed explanation of the other evidence you have considered in concluding there is sufficient evidence for the Little Shell to meet the criteria other than criterion (e). Alternatively, it is not clear how the referenced "evidentiary gaps" are filled by evidence of descent.

The text places emphasis on a conclusion of the technical report that many, albeit a minority, of the petitioner's members were listed on a judgment roll to share in an award made by the Indian Claims Commission. These funds, by law, were paid on the basis of lineal descent from a historical tribe. Thus compilation of the judgment roll was not based on evidence of the existence of a distinct community or the exercise of tribal political influence. We are therefore uncertain how it applies to criteria (b) and (c), if that was the intent.

The e-mail text refers to the petitioner's ancestors as having been "involved in Little Shell's band." The technical report did not identify substantial involvement which would help demonstrate continuity under criteria (b) and (c). To develop this part of a finding, we need to know what kind of involvement, at what time periods, has been considered in reaching your decision.

The reference in the e-mail text to "the migrations issues and distances between settlements" is unclear. Issues relating to tribal continuity arise from the unresolved questions of how and when the petitioner's ancestors migrated to Montana, and whether they migrated as individuals or as a group or groups. Issues relating to the existence of social community and political influence arise from the great distances between historical Montana settlements of the petitioner's ancestors as well as modern populations of the petitioner's members. If the text's conclusion is that the evidence relating to these issues is sufficient, guidance is needed for the decision document concerning the evidence you have considered concerning the migration of the petitioner's ancestors and their settlement pattern in Montana and found to be sufficient to meet criterion (b) and criterion (c).

The e-mail text says that two of the six treaty signers for the Pembina Band in 1863 were "half breeds." The technical report did not reach this conclusion. We assume that you have based this conclusion on the fact that two of the Pembina "warriors" who signed the treaty had French surnames. We have drafted the proposed finding to reflect that fact that the name of the signer from whom a few of the petitioner's members appear to descend was Joseph Gourneau rather than John Gorneau. Evidence available in the record for this finding states that Gourneau was 4/4 Chippewa (or Chippewa and Menominee). He appears to have acquired a French surname from his father's stepfather, who also was named Joseph Gourneau. In this case, then, it does not appear that a French surname equated with Métis or "mixed-blood" status.

The e-mail text does not set out reasons or evidence which would to establish the continuity as a tribal political community of the petitioner's Métis ancestors with the Pembina Band required to meet criteria (b) and (c). The text provides only a brief suggestion, from treaty-related documents, of a political linkage between the Pembina Band and their Métis relatives in the treaty period. The technical report notes that historical studies conclude Métis were, by and large, not part of tribes but were socially and culturally distinct peoples with separate leaders. The technical report does not have substantial information to show political linkages between the petitioner's Métis ancestors and the Pembina Band but leaves open the possibility that additional evidence may show them to have been united as a single political body.

Your e-mail of April 14, 2000, does not provide a rationale for how each of the seven mandatory criteria has been met. Past practice has been to evaluate the evidence relating to each criterion and to present a discussion which concludes whether or not each criterion was met. The present draft does not separately address each criterion. To prepare a revised decision which specifically addresses each criterion we will need additional guidance on the evidence and reasoning upon which you have relied to find that the petitioner meets its burden of proof for each of the criteria.

We have drafted the proposed finding on the assumption that the intent was to find that a majority of the petitioner's current members descend either from ancestors who can be assumed to have been members of the historical Pembina Band prior to the treaty of 1863 or from ancestors who were documented members of the successor Turtle Mountain Band circa 1892. The language of the e-mail message incorrectly stated that the petitioner's ancestors¹ encompassed the majority of the Pembina Band." However, the technical report did not identify the members of the historical Pembina Band and could not make this conclusion based on the available evidence. There is of course no requirement that a petitioner represent most of the descendants of an antecedent tribe.

DEPARTURES FROM PRECEDENT

The e-mail text appears to accept an absence of evidence meeting criterion (b) and criterion (c) for a period of at least 70 consecutive years. The existing precedent is that in every case the Department has required evidence of continuous historical existence of a distinct community (criterion (b)) and the exercise of political influence or authority (criterion (c)), without any substantial periods of inactivity or insufficient evidence. Is the intent to change the precedents concerning continuity and/or is there evidence for continuity that you have considered in this part of your decision? The language of the regulations requires continuity for these two criteria, defining "continuously" as "extending from first sustained contact with non-Indians throughout the group's history to the present substantially without interruption" (§83.1). Tribal continuity is the essential legal requirement of the Secretary's authority to acknowledge tribal existence.²

¹ We have assumed that the reference to "descendants" was intended to be "ancestors."

² The Department, in promulgating the acknowledgment regulations (59 FR 9282), noted that "The Federal court in *United States v. Washington* rejected the argument that, 'because their ancestors belonged to treaty tribes,

The e-mail text appears to reduce the standard for meeting criterion (e) to a "majority" of the petitioner's members having descent from a historical tribe, while the existing precedent has required at least 80 percent of members to have descent from a historical tribe. Is the intent to alter this precedent?

The e-mail text places emphasis on a conclusion of the technical report that 2 percent of the petitioner's members descend from one of the six signers of the 1863 treaty, who you have identified as Metis. What reasoning or historical facts provide a basis for giving descent from a treaty signer more weight than descent from other members of a historical tribe? There is no precedent for this in past cases and we did not find regulatory language on which to base it.

The e-mail text does not specifically address criterion a. The technical report found there was an absence of evidence meeting criterion (a), external identification, for a period of 35 consecutive years. The criterion requires such identification on a "substantially continuous basis." The existing precedent has required evidence meeting criterion (a) for each decade.

The text of your e-mail found the attempts of the Little Shell group in the 1930's to achieve IRA status important because it indicated "the desire for the Little Shell group to maintain their status." The existing precedent has not accepted a desire or attempt to obtain recognition as evidence which indicates the existence of a tribe or as evidence that meets the criteria. The regulations provide that any group that believes it should be acknowledged as an Indian tribe can petition (§83.4 (a)), irrespective of whether the group is a tribe or not. It is unclear from the language of your e-mail whether you also intended to refer to the Federal government's intentions, since these were to change rather than maintain the status of the Little Shell's ancestors, by organizing them as a community of half-blood Indians under the IRA.

The e-mail text emphasizes the support of federally-recognized tribes for the acknowledgment of this petitioner. There is precedent for citing such expressions of support as evidence which meets criterion (a) at a specific time. However, in evaluating the other criteria, existing precedent has given little weight to mere expressions of support for or opposition to a petition by other parties, absent their submission of evidence or arguments relevant to the criteria. We note that giving these expressions greater weight would appear to require giving greater weight than has been given in the past to opposition by recognized tribes. In past decisions, opposition from recognized tribes has not been considered a basis on which to deny the acknowledgment of a petitioner (e.g., Cowlitz, Snoqualmie and San Juan Southern Paiute).

ALTERNATIVES TO THE DRAFT PROPOSED FINDING

the appellants benefitted from a presumption of continuing existence.' The court further defined as a single necessary and sufficient condition for the exercise of treaty rights that tribes must have functioned since treaty times as 'continuous separate, distinct Indian cultural or political communities' (641 F.2d 1374 (9th Cir., 1981)). Thus simple demonstration of ancestry is not sufficient."

In view of these issues and questions about the issuance of a positive proposed finding in its current form, you may wish to consider the following alternative ways of meeting your objectives.

(1) Suspension of Active Consideration:

In a meeting you had with the BAR staff, a suggestion was made that the petitioner be given a technical assistance letter rather than a negative proposed finding in order that the petitioner could correct the deficiencies in its documentation prior to the issuance of a proposed finding.

The main problem with this petition is the lack of evidence about the petitioner's ancestors prior to 1927. This deficiency appears to have stemmed from the petitioner's argument that it had been previously recognized by the Federal Government during the 1930's. BAR advised them, well prior to active consideration, that this was not correct. The petitioner responded with the incorrect assumption that it had been part of the Turtle Mountain Band in North Dakota and had therefore previously been recognized by the Federal Government as late as 1904 as part of that tribe. For these reasons, most of the documentation in the record relating to the 19th century pertains to the Turtle Mountain Reservation and not to the petitioner's ancestors in Montana.

The Assistant Secretary has the authority under the regulations (§83.10(g)) "to suspend active consideration . . . upon a showing to the petitioner that there are technical problems with the documented petition or administrative problems that temporarily preclude continuing active consideration." The rationale in this instance would be that the petitioner submitted its documentation under a misunderstanding of its status, and now will be given an opportunity to respond thoroughly to the requirements of the regulations.

The petitioner could be sent a copy of the technical report plus a new technical assistance letter containing specific recommendations on the further research and additional documentation needed to improve the petition.

(2) Recognition Outside of the Acknowledgment Regulations:

The acknowledgment regulations may not be the appropriate means for the consideration of the status of this petitioner. The statement in the regulations on the "scope" of the administrative process of acknowledgment says that it applies "only to those American Indian groups indigenous to the continental United States. . . ." (§83.3(a)).

The technical report found that, with the evidence available in the record for this case, only 48 percent of the petitioner's members could be linked to a named ancestor on a 19th century record which would establish that they had ancestry from the historical Pembina Band of Chippewa or its successor the Turtle Mountain Band. The technical report found that many of the petitioner's members had ancestry from the Red River Colony in British territory, while the ancestry of many of the petitioner's members had not been traced and potentially derived from a Canadian origin.

While it may be possible to establish, by the reasonable likelihood standard, that the Métis along the Red River in both American and British or Canadian territory were part of one historical community, the petitioner has not done so. There also is reason to believe that such a transnational Métis community was the product of intermarriages between non-Indians and members of several Indian tribes, not just one historical American Indian tribe.

The case can be made that, despite the possibility that this petitioner has origins substantially from Canadian rather than American Indians, there are federally-recognized Indian tribes today that have similar origins. The closest parallel to the composition of the Little Shell of Montana is the Chippewa-Cree Tribe of the Rocky Boy's Reservation in Montana. The argument can be made that, despite the possible inability of the Little Shell petitioner to meet the requirements of the acknowledgment regulations, elementary fairness dictates that it achieve the same status as similar Indian groups. An acknowledgment decision issued outside the regulations would be based on your general authority to recognize tribes.

(3) Support of Legislative Recognition:

Another alternative would be to recommend legislation to acknowledge this petitioner. This recommendation would be based on a finding that because of the unique and complicated nature of its history, this petitioner is outside the scope envisioned by the regulations, but nonetheless merits tribal status. This alternative would be best pursued, however, after receipt of comments on a recommended negative proposed finding, so that the most complete understanding of the petitioner's history and connection with historical tribes would be available.

Congressional recognition would eliminate questions likely to be raised under alternative (2) above about the extent of the Secretary's authority to recognize tribes.

(4) Reconsider the BIA's Recommended Proposed Finding:

We continue to recommend that you issue a proposed finding against acknowledgment, revising our draft proposed finding as necessary and providing sufficient technical assistance to the petitioner to allow it to use the comment period to demonstrate that it meets the acknowledgment regulations. This alternative would be the one most consistent with your directive published in the *Federal Register* on February 11, 2000, which stresses the role of the proposed finding to define the deficiencies in the petition and to identify the additional evidence needed from the petitioner, and the role of the comment period as the appropriate means for the petitioner to use to present additional evidence to remedy the deficiencies in its original petition.

The recommended proposed finding rested not on a conclusion that the petitioner is not a tribe, but on a conclusion that the record contained inadequate evidence for a long, multigenerational period of time which constitutes a major portion of the history of the petitioner's ancestors. Historical records exist which could provide relevant missing information. Identifying these records and explaining how they could be used would be the major focus of the technical assistance the BAR staff would provide to the petitioner to aid it in its response to the proposed finding.